No. 90-1059

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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I

THE DECISION BELOW MISCONCEIVES AND MISAPPLIES STRICT SCRUTINY IN CONFLICT WITH DECISIONS OF THIS COURT

The conflict between the decision below and this Court's First Amendment jurisprudence is underscored by the Board's concession that the purpose of Section 632-a is "not to compensate the broad class of crime victims" but only "to benefit a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime." (*See* Brief in Opposition at 15.) That Section 632-a makes the exercise of First Amendment rights the trigger of special victims' compensation is precisely what renders the law unconstitutional.

The Petition urged that review was necessary because the decision below effectively jettisoned the longstanding rule that to uphold a statute that differentially regulates the press, or one whose application depends on content, the state must demonstrate that not only the regulation but also the suspect distinctions it draws are necessary to serve compelling governmental interests. *See* Petition at 12-14 (relying on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Carey v. Brown*, 447 U.S. 455 (1980)).

The Brief in Opposition fails utterly to explain how this requirement can be met or why the failure to comply with it is not fatal to Section 632-a. The Board does not dispute its obligation to justify the law's distinctions, *see* Brief in Opposition at 14-17, but it fails to identify any compelling interest for assisting only "a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime."

Consider, for example, three robbers who jointly hold up a bank. One of the three, like Willie Sutton, is hired after serving a prison sentence to assist a bank in avoiding further robberies, based on his experience; the second is granted immunity and enrolled in the witness protection program and given monthly "transitional" payments; the third, after a prison sentence, becomes a black political activist and writes his life story as *The Autobiography of Malcolm X*. New York does not prohibit these payments to the first two criminals, even though their their conduct is made possible by a "specific crime involving a particular victim" (*see* Brief in Opposition at 17, quoting the decision below, 15a); only the payment to the author is banned.[1]

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[1] The Board's conclusory assertion that strict scrutiny was applied "*based upon a substantial record* supporting New York's compelling interest in ensuring that criminals not profit at the expense of their victims . . . " (Brief in Opposition at 17) is simply inaccurate. The three affidavits submitted by the Board made no attempt to provide evidentiary support for any of the factual propositions that the Board was required to prove to pass strict scrutiny — for example, that any necessary improvements to existing laws could not have been enacted without content-based distinctions and targeting of the media, that there was a compelling need to limit the statute only to payments for

(continued...)

Without compelling necessity for a measure assisting victims only of crimes which are subsequently mentioned in works by convicted, accused, or self-admitted criminals, and not crime victims generally, Section 632-a and the decision below cannot be squared with this Court's cases. (Petition at 12-16.)

Apparently aware of its failure to prove that distinctions in regulation targeting the press and content-based regulation be found necessary to serve compelling interests, the Board seeks to avoid review on a ground that each member of the Second Circuit panel rejected, namely that the statute could have been sustained under the lesser standard of *United States v. O'Brien*, 391 U.S. 367 (1968). Brief in Opposition at 17-18. *O'Brien* considered a statute of general applicability that could, in some instances, affect expressive conduct. Section 632-a, by contrast, is designed to deal with speech in every instance of its application, and, further, is content-based. Thus, correctly, neither the majority nor the dissent below invoked *O'Brien*.

All panel members agreed that *Meyer v. Grant*, 486 U.S. 414, 423-25 (1988), unambiguously and unanimously held that direct restrictions on payments for speech are tantamount to direct restrictions on speech subject to scrutiny. *See* Petition at 11.[2] The failure of the Brief in Opposition to distinguish or even cite *Meyer* only highlights the conflict between that decision and the judgment below.

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[1](...continued)
speech, and that doing so would likely serve the state's interest more than it would hurt it.

To the extent that the Brief in Opposition offers any factual support for Section 632-a, it relies solely on conclusory statements in law review articles written well after enactment of the statute.

[2] *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702, 707 (1986) (different standard of review for generally applicable laws that are incidentally applied to bookstores than for laws having "the inevitable effect of singling out those engaged in expressive activity"); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("We cannot share the view that . . . expenditure limitations are comparable to restrictions on conduct upheld in *O'Brien*.")

Finally, the need to review the decision below is not altered by the Board's attempt to justify the law's limitation only to victims of those who later write about their crimes with the maxim that no person "shall be permitted . . . to take advantage of his own wrong." The Board has not yet shown how payment for books like *The Autobiography of Malcolm X* or *Manchild in the Promised Land* can constitutionally be considered "taking advantage of" crime, rather than compensation for the time and effort expended in creating protected speech. The Board has not shown why the state should regulate payment for writing about crime but not payment for other activities in which criminals "take advantage . . . of [their] own wrong[s]." In any event, none of the judges below thought that preventing crime from paying was in fact the interest underlying the statute. The law, moreover, plainly permits such "taking advantage" of crime, since it provides that covered payments for expression will be returned to the criminal-author after five years if no judgment has been obtained, or if the author's own funds have satisfied the judgment.

II

THE RECORD AND COMMONSENSE SHOW THAT THE SON OF SAM LAW POSES A CONTINUING THREAT TO SPEECH

Attempting to avoid review by asserting that "the record is barren of any concrete examples from publishers or criminals that the statute has deterred them from speaking or from publishing . . . ", the Board has ignored this Court's First Amendment jurisprudence and misstated the record. Brief in Opposition at 19.

The Court regularly takes judicial notice of the likely consequences of laws restricting payments for speech, just as it considers the likely consequences of any legislation affecting fundamental rights. *See, e.g., Meyer v. Grant*, 486 U.S. at 423-24; *Riley v. National Federation of the Blind*, 487 U.S. 781, 789, 794 (1988); and *Buckley v. Valeo*, 424 U.S. at 19 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.") By contrast, the

cases that the Board claims hold that any deterrent effect must be proven without reliance on what is likely to occur, *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972), and *Arcara v. Cloud Books, Inc.*, 478 U.S. at 706, are inapposite, since those cases considered not speech-targeted and content-based measures, as here, but only generally applicable measures incidentally applied to expressive conduct (in *Branzburg*) or incidentally applied to non-expressive conduct (in *Arcara*). Such laws are judged under entirely different standards than laws that are content-based or that target speech. *Arcara*, 478 U.S. at 704, 706-07.

In addition to what logic and basic economics teach is the "inevitable effect of reducing the total quantum of speech," *Meyer v. Grant*, 486 U.S. at 423, Simon & Schuster also relied on uncontradicted affidavits showing "concrete examples" of the law's deterrent effect. *See* Petition at 7-8, 11-12, 17 (citing affidavits below providing examples of bowdlerized text and books not undertaken resulting from Son of Sam laws). The Board's ignoring these cannot erase them from the record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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